APPENDIX A

A Discussion of Property Rights

The content of the term "property right" has greatly changed in the past two centuries. (See Powell on Real Property, Par. 746). If one looks far enough backward it could fairly be said that "he who owns may do as he pleases with what he owns." This is not the present law. The present law of land has hesitatingly embodied an ingredient of stewardship; which has grudgingly, but steadily, broadened the recognized and protected scope of social interest in the utilization of things. A property right no longer includes a privilege in the individual owner to act substantially to the detriment of his fellow citizens.

Felix Cohen, in one of his essays published in 1960 (The Legal Conscience at 41), refers to "property" as a "function of inequality." The germ of truth in this has present relevance for as demonstrated throughout this Appendix our law of property has been characterized by governmental redress of that inequality in so many instances that for the state to permit continuation of an inequality is tantamount to endorsing it as an expression of public policy.

So much of the American interposition for the modification of absolute property rights is both so well entrenched and so long accepted that we sometimes fail to recognize its full significance. Property consists mainly in (a) a power to dispose; and (b) a power to use. See Blackstone, Comm. I:138.

Both of these powers have been significantly curtailed in the centuries which are back of us. Both of these powers are likely to be further curtailed in the years just ahead.

The power to dispose of owned assets has been outstandingly cut down by (a) the rule against perpetuities; (b) the

law on illegal dispositions; and (c) the insistence upon formalities as prerequisites for full efficacy. Powell on Real Property ¶¶839-858.

Beginning in the late seventeenth century, the rule against perpetuities took final form after a gestation period of a century and a third as a magnificent judicially manufactured ingredient of the law designed to curb the power of the dead hand to rule the future. It placed outer limits of time on the power of the too often assumed all-wisdom of present owners. Powell on Real Property ¶762.

Rooted even more anciently in feudal practices, restraints upon the alienation of present interests earned invalidity. At one time, a feudal tenant could lose the hand, which derogated from the overlord's rights, by presuming to pen a deed of alienation. Modern thinking has made less drastic the prohibited forms of alienation and has made milder the penalties for overstepping established barriers; but the law as to illegal restraints on the alienation of property bulks large as restrictions upon what the owner of property can do with that which he believes he owns. Restatement of Property §§404-423. "Illegality" is broader than the restriction upon the alienability of property. Whenever a proposed provision is judged significantly to interfere with the long-time welfare of society, it encounters a stern prohibition. In general, these situations involve efforts by the owner of property to use the bait of wealth to control the conduct of his donees. Such attempts have been found illegal where the donor

a. has attempted to control or to preclude marriage; Restatement of Property §§424-427.

b. has attempted to shape an exercise of the power of testamentary disposition; Restatement of Property §§428-432.

c. has attempted to interfere with the religious behavior of the recipient; Restatement of Property §434.

d. has attempted to cause departures from normal familial relationships; Restatement of Property §433.

e. has sought to meddle with the education or life work of the recipients; Restatement of Property §436.

Such uses of wealth are potentially anti-social and hence have been found deserving of substantial curtailment.

More important than the power to dispose is the power to use. As one looks back over the centuries and decades preceding 1963, the ever advancing flow of social restrictions on the individual's exercise of his "privileges of use" becomes most impressive.

When the owner of a large parcel of land conveys an interior part, it is socially undesirable to have land which cannot be worked, and hence the conveyor is presumed to have granted an easement by necessity for access to and exit from the conveyed land. *Finn* v. *Williams*, 376 Ill. 95, 33 N. E. 2d 226 (1941). The otherwise existent power to enforce undisturbed possession is negatived, in part, by an implied easement grounded in social policy.

When Blackacre and Whiteacre are in the same locality, the owner of Blackacre may not so use his land as to lessen the reasonable enjoyment of Whiteacre by its owner or occupier. The twelfth century assize of nuisance, (McRae, "The Development of Nuisance in the Early Common Law," 1 U. Fla. L. Rev. 27 (1948)), began the curtailment of the privileges of use which was essential to the maintenance of a fair standard of neighborliness as between nearby land occupiers. Modern equity since the year 1800, has been making constantly new applications of the basic idea that one must so use his own as not to injure others. W. W. Cook, Equity in 5 Enc. of the Social Sciences, 582-586 (1931).

The law of waters, whether in streams, or on the surface, in underground springs, or lowering clouds, has as a backdrop the facts of nature. The amount and regularity of the rainfall, the geologic factors below the surface and the topographic configuration of the surface combine to determine the total moisture available to the several owners of affected land. Powell on Real Property ¶708. Considerations of social policy fix the scope of "reasonable use."

Courts repeatedly assert that property rights are, and always have been, held subject to the "police power"; that is the power of the government to do that for which it exists, namely, to impose restrictions (without compensation to the owner) upon property owners *whenever such restrictions are found to serve the health, the safety, the morals, the conservation of resources, or, the general welfare of the governed group.* On this basis, the "residential" character of neighborhoods has been protected from "mobile kitchens" (*Eleopoulos* v. *City of Chicago*, 3 Ill. 2d 247 (1954)); manufacturing areas have been protected from excessive noises (*Dube* v. *City of Chicago*, 7 Ill. 2d 313 (1956)), a statute of Virginia, compelling the connection of a private home with the city water works system, has been upheld (*Weber City Sanit. Comm.* v. *Craft*, 196 Va. 1140 (1955)). Sanitary legislation began as early as 1389 (Stat. 12 Rich. II, c. 13). Commissioners of sewers were established in 1430 (Stat. 8 Henry VI, c. 3). Building regulations received a large impetus from the Great Fire of 1666 in London. The importance of safeguarding "health" and "safety" gained new recognitions in the nineteenth century.

Building Codes are now a commonplace in almost every community. By 1951, some 2233 municipalities were listed as having such codes. Building Regulation Systems in the United States, 1951, published by the Housing and Home Finance Agency of the Division of Housing Research. See also Note, 6 Stanford L. Rev. 104, at 113 (1953). They estab-

lish specifications both as to the construction and use of buildings. Multiple dwellings and tenements have requirements as to plumbing, toilet facilities, air space per occupant and ventilation. No property owner is allowed to indulge his fancy for yard or piazza water closets (*City of Newark* v. *Chas. R. Co.*, 17 N. J. Super. 351 (1952)). Factories, in proportion to the number of workers employed, have requirements as to plumbing, ventilation and the minimizing of fire hazards, plus additional requirements dictated by the kind of work engaged in. Powell on Real Property ¶862. Similarly circumscribed as to permissible utilizations of their land are mercantile establishments. Special requirements exist as to steam boilers, elevators, fire escapes, fire proofing and modes of egress. Powell on Real Property ¶863.

In the field of morals, there has been a similar evolution. Profitable houses of prostitution are no longer the privilege of respectable property owners. Note, 24 Wash. L. Rev. 67 (1949). Obscene exhibitions incur remedial social action. *State ex rel. Church* v. *Brown*, 165 Oh. St. 31, 133 N. E. 2d 333 (1956). Gambling is generously frowned upon. See, for example, Iowa Code (1955) §99.1, injunction against gambling; §726.1, penalty for keeping a place for gambling; Mass. Ann. Laws (1955) c. 271, §§5A, 7, 8, 18 and 23. The desirable outer limits on police power regulation with respect to the public morals becomes less clear as doubts grow concerning the exact content of morality and the efficiency of courts or legislatures in compelling general morality. Powell on Real Property ¶864. See also Symposium on Obscenity and the Arts, 20 Law and Contemporary Problems, 531-688 (1955). The areas in which active debate is now observable concern chiefly gambling and sexual conduct. The fact remains that property owners have been, and can be, effectively debarred from any use of their

property found to offend public morals and such curtailment of "property rights" calls for no reimbursement of the owner so debarred.

In the wide open spaces of the West, there have been comparable developments. Soil conservation districts have adopted sometimes quite costly land use regulations which must be observed by all owners in the district. Parks, Soil Conservation Districts in Action 13, 147 (1952). Conformity has been assisted by the conditioning of land loans on prescribed social behavior. (Note, 1950 Wis. L. Rev. 716). In areas devoted to cattle raising, individual owners are prevented from making short-term gains by overgrazing. Penny and Clawson, "Admin. of Grazing Distr.," 29 Land Econ. 23 (1953), This has been accomplished in some areas by conditioning permits to use public lands needed for grazing on the applicant having used his privately owned land in a manner preserving its long-term value. (See Federal Taylor Grazing Act, 43 M. S. C. A. §315 and the Montana Grazing Act, Mont. Rev. Code 1947, §§46-2382). Thus private ownerships are curtailed in their uses of their "owned land" so as to assure adequate continuing supplies of forage. Rural zoning to preserve timber and to accomplish reforestation of cutover areas not only serve the desirable ends of conservation, but also serve the collateral purpose of restoring local tax revenues by returning land to the growing of timber and delaying the need for as yet unbearable expenses for local roads and school maintenance (See Washington's Forestry Practices Act, discussed in *State of Washington* v. *Dexter*, 32 Wash. 2d 551 (1949); Solberg, "Rural Zoning in the United States," Agric. Inform. Bull. No. 59 (1952)).

Courts and legislatures have resorted to the "police power"—the general welfare of the group—in problems involving renters (41 Stat. 298 (1919), constitutionality sustained in *Hirsh* v. *Block*, 256 U. S. 135; N. Y. Laws 1920 cc.

131-139, constitutionality sustained in *New York ex rel. Brixton Operating Corp.* v. *La Fetra*, 230 N. Y. 429, 130 N. E. 601, affd. 257 U. S. 665; see also Powell on Real Property ¶252) and borrowers (Powell on Real Property ¶¶471-474).

The objectives of zoning center on the promotion of the welfare of the community. It has become established since 1925 that the "property rights" of any land owner are subordinate:

a. to the establishment of residential areas in which relaxation and relative tranquility can be enjoyed, and in which there will be absent the vibration, noise, smoke, odors, fumes and bustle of industry and commerce; *Village of Euclid* v. *Ambler R. Co.*, 272 U. S. 365; McQuillan, Mun. Corp. (3d Ed.) 1950, §§25.07, 25.96-25.109; Toll Zoning for Amenities, 2 Law and Contemp. Prob. 266 (1955).

b. to the establishment of areas devoted to the provision of goods and services without an intermixture of more offensive uses; *Bartram* v. *Zon. Com. of Bridgeport*, 136 Conn. 89, 68 A. 2d 308 (1949); *Town of Marblehead* v. *Rosenthal*, 316 Mass. 124, 55 N. E. 2d 13 (1944),

c. to the social need for controlling densities of population so that the public services of transportation, policing, fire protection, water and power supply and waste removal can be efficiently rendered. Symposium, 20 Law and Contemp. Problems 197, 238, 481 (1955).

These decisions embody a pragmatic reconciliation of the conflicting pulls of the constitutional guarantee that private property shall not be taken without compensation and the underlying police power of any government to serve the social welfare. The transitional judicial thinking on this

subject is well illustrated by contrasting the District Court in *Schneider* v. *District of Columbia,* 117 F. Supp. 705 (1953), with the ultimate decision of the same case, *Berman* v. *Parker,* 348 U. S. 26.

As early as 1945, Mr. Justice Jackson in stressing the control of private rights by consideration of social concern (*U. S.* v. *Willow River Power Co.,* 324 U. S. 499) had said:

> "Only those economic advantages are 'rights' which have the law back of them . . . whether it is a property right is really the question to be answered . . . .
>
> "Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right or perhaps it would be more accurate to say that as against the Government, such private interest is not a right at all."

And see Cross, "The Diminishing Fee," 20 Law and Contemp. Prob. 517 (1955).

Thus, the subjection of property rights to competing claims is irrevocably embedded in our law. The nature of the claim to be free from racial segregation is so compelling, and, today, so clear, that no property owner can be heard to say that his "inalienable," "sacred," right to discriminate is somehow immune from this normal process and must be sanctioned and enforced by law. If anything, an owner should expect that the element of stewardship with which all property is impressed, carries with it an obligation, which the law will recognize, not to employ one's public facilities in a way which injures and humiliates a large portion of the public.

Where, alas, has gone the "liberty" of property owners to maintain and to operate structures which smell to high heaven, which are destructive of the lives, or health, or safety, or welfare of customers and workers? Just where it was bound to go! Into the limbo. By the curtailment of these "liberties" there has been assured the larger liberty of society as a whole.

APPENDIX B

Survey of the Law in European and Commonwealth Countries

1. *France*

Article 184, paragraph 2, of the French Penal Code, the only provision that relates to occurrences showing some resemblance to sit-ins, declares punishable the entry, with the aid of threats or violence, of the domicile of a co-citizen. It would be inapplicable to conduct involved in the case at bar for two reasons: First, an essential element of the crime is the use of threats or violence; second, a place of public accommodation does not qualify as "*domicile*" as that term is used in article 184(2).

In France, a peaceful sit-in, rather than commit a crime, has a statutorily protected right to be served. According to Decree No. 58-545 of June 24, 1958 (*Journal Officiel* of June 25, 1958), every person engaged in commercial activities (*commerçant*) is prohibited, on penalty of imprisonment and/or fine, from refusing service to a person who in good faith requests that it be rendered, if the *commerçant* is able to render the service in accordance with normal commercial customs and no law forbids him from rendering it. Although, in the absence of practices of racial discrimination, this provision has never been applied to situations similar to those presented in the present case, its broad language would appear to make escape from its prohibitions impossible.

2. *Italy*

In Italy, as in France, the penal provision protecting the home against unlawful entry does not cover peaceful sit-ins in places of public accommodation. Article 614 of

the Italian Penal Code makes criminal only entry of a home (*abitazione*) or other private residence (*luogo di privata dimora*) against the will of the person who has the right of exclusion, and does not apply to places of public accommodation.

Furthermore, in Italy, the peaceable sit-in would have a right to be served. Article 1336 of the Italian Civil Code, entitled "offer to the public at large" ("*offerta al pubblico*"), provides that unless circumstances or usage indicate otherwise, an offer to the public at large may be accepted by any member of the public. A term in the offer or contract excluding Negroes would be disregarded as violative of Italian public policy. Italy's policy against racial discrimination is firmly embedded in Article 3 of its Constitution, providing that all citizens are equal regardless of sex, race, language, religion, political conviction, or personal or social standing.

3. *Belgium*

Article 439 of the Belgian Penal Code declares punishable the entry of a home, apartment, room or lodging inhabited by someone else against the latter's will, if the entry is made with the aid of threats or violence against persons, or by breaking, climbing in, or with false keys. Article 442 of the same code similarly declares punishable whoever has entered any of the places specified in article 439 without the consent of the owner or the tenant and is found there during the night. Neither of these articles apply to peaceful sit-ins, since (1) they are designed to protect only a person's home or residence and not places of public accommodation and (2) peaceful sit-ins do not involve nocturnal visits and are, by definition, neither accompanied by threats or violence nor effectuated by breaking or climbing in or by using false keys.

It is unclear whether in Belgium a peaceful sit-in would have the right to be served. The answer would seem to depend in part on whether Article 6 of the Belgian Constitution, which provides that all Belgians are equal before the law, also applies to individual, as distinguished from governmental, action. If it does, the answer would be in the affirmative.

4. *The Netherlands*

Article 138, paragraph 1, of the Dutch Penal Code declares punishable whoever unlawfully enters the home or the premises or homestead of someone else or whoever unlawfully staying there refuses to leave. Prominent Dutch authority supports the view that this provision affords protection not only against unlawful invasion of the home, but also against unlawful entry of other premises, including places of public accommodation. See, *e.g.*, 2 *Van Bemmelen & Van Hattum, Hand-en Leerboek van het Nederlandse Strafrecht* 164-65 (The Hague-Arnhem 1954). Nevertheless, this article would not outlaw peaceful sit-ins, since the entry and refusal to leave of sit-ins cannot be characterized as "unlawful." Every owner of a place of public accommodation extends an offer of service to members of the public. A term in his offer limiting it to members of a particular racial group would not be given effect as being against public policy. As a result, a Negro accepting the offer would obtain a right to be served. Since that right would render his entry and refusal to leave lawful, he would not come within the ambit of article 138. The operative Dutch public policy is embodied in Article 14 of the European Convention on Human Rights to which The Netherlands is a party and which prohibits discrimination on the ground of race.

Since a Negro, by accepting the offer of the owner of the place of public accommodation, in effect concludes a contract, he would, in Holland, have a civilly protected right to be served.

5. *Norway*

Article 355 of the Norwegian Penal Code is similar to the corresponding Dutch provision in that it outlaws unlawful entry not only of the home but also of a "vessel, railroad car, motor vehicle or aircraft, or a room in any of these or in any other enclosed place." As a consequence, it would seem to protect against "unlawful" entry of places of public accommodation. Nevertheless, for the same reasons as those elaborated in the discussion of Dutch law, the entry and refusal to leave of a Negro sit-in would not be "unlawful" and therefore not come within the ambit of article 355.

Furthermore, in Norway, a peaceful sit-in would have a right to be served. The existence of this right follows from general principles of contract law, under which the person who exploits a place of public accommodation extends an offer of service to the public at large which may be accepted by a Negro, who may disregard as violative of public policy an exclusion based on race embodied in the offer. Indeed, a person who refuses service solely on the ground of race of the person who requests it may well come within the compass of Article 246 of the Norwegian Penal Code which declares punishable anyone who unlawfully, in word or deed, offends another person's feeling of personal honor.

6. *Germany*

Article 123 of the German Penal Code declares punishable unlawful entry not only of the home, but also of commercial premises (*Geschäftsräume*). It similarly makes it a crime for someone who has no right to be there to refuse to leave these places upon demand by the person entitled to their use and possession. There is no doubt that the broad language of this provision also covers places of public accommodation. Nevertheless, a peaceful sit-in would not come within the compass of its prohibitions.

It is an essential element of the crime of article 123 that the person who has entered the premises has done so unlawfully or stays on the premises without having a right to be there. In the case of a peaceful sit-in, that essential element would be lacking. Two grounds support this conclusion.

Article 3, paragraph 3, of the German Constitution provides that nobody may be granted a disadvantage or advantage because of his sex, birth, race, language, nationality and origin, belief, or religious or political opinions. Although there is a division of opinion among Germany's legal scholars and the problem has not yet been resolved explicitly by the German constitutional court, German scholars of great prominence as well as the first Senate of the Federal Labor Court hold this constitutional mandate to be directed not only to public officials, but also to private individuals. See, *e.g.*, *Leisner, Grundrechte und Privatrecht* 332-53 (Munich 1960); Nipperdey and Boehmer in 2 *Neumann, Nipperdey & Scheuner, Die Grundrechte. Handbuch der Theorie und Praxis der Grundrechte* 20, 422 (Berlin 1954); *S. H.* v. *M. L. F.*, December 3, 1954, 1 *Entscheidungen des Bundesarbeitsgerichts* 185 (1954); *Landkreis U.* v. *Schwester K.*, March 23, 1957, 4 *Entscheidungen des Bundesarbeitsgerichts* 240 (1957). If it does circumscribe the permissible conduct of individuals, there is no doubt that a

refusal of service and a demand to leave the premises based merely on race is in violation of the German Constitution and cannot be given the effect of making unlawful the sit-in's entry of, and presence on, the premises.

However, even if the constitutional provision would not address itself directly to individuals, the sit-in's entry and presence would not be unlawful. Although older authority seems to support the view that places of public accommodation cannot be regarded as extending an offer to the public at large and do no more than invite the public to make an offer, consisting of a request for service, the modern opinion, supported by prominent and most authoritative German scholars, is that the question of whether a place of public accommodation extends an offer to the public must be answered in accordance with the circumstances of the individual case. For the modern view, see 1 *Erman, Handkommentar zum Bürgerlichen Gesetzbuch* 217-218 (3d ed. Westfalen 1962); *Palandt, Bürgerliches Gesetzbuch* 116 (21st ed., Munich and Berlin 1962); 1 *Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* 878 (11th ed. by Brändl & Coing, Berlin 1957). This opinion, which favors the finding of an offer, would clearly give the peaceful sit-in, who accepted the offer by entering and ordering, a contractual right to remain on the premises and to be served. Furthermore, even if the sit-in's right to enter, to remain on the premises, and to be served could not be based on a contract, it could be grounded on general principles of tort law. According to Article 826 of the German Civil Code, every act that is *contra bonos mores* (*gegen die guten Sitten*) constitutes a tort that creates a claim for compensation of the damages it causes. There is no doubt that a refusal to give service based on discrimination against the customer's race alone would violate standards of proper conduct generally accepted in Germany and therefore constitute a tortious act. Even those

who oppose the direct applicability of Article 3, paragraph 3, of the German Constitution to private individuals agree that its provisions make clear to what norms an individual's conduct in society must conform. Since article 826 imposes on the place of public accommodation the obligation not to refuse service merely on the basis of the customer's race, the customer would have the corresponding right to enter and remain on the premises. Clearly, the customer's entry and remaining on the premises would be measures designed to protect himself against the unlawful discrimination practiced by the place of public accommodation. Since Article 227 of the German Civil Code provides that a measure that is necessary to defend oneself against an unlawful act is lawful, the customer would undoubtedly be acting lawfully by entering and remaining on the premises.

7. *England and the Commonwealth Countries*

In England, a "sit-in" would seem to be non-criminal, because the criminal trespass laws there require force.[1]

In four provinces of Canada, Fair Accommodation Practices Acts prohibit racial discrimination in public accommodations.[2] In the remaining provinces, it is doubtful whether the criminal law would reach this activity.[3]

In India, racial discrimination in public accommodations is prohibited by the Constitution.[4]

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[1] 10 Halsbury, Laws of England, Criminal Law §1100 (3d. ed. 1955); *Rex* v. *Bake*, 3 Burr. 1731, 97 Eng. Rep. 1070 (K. B., 1765); *Rex* v. *Wilson*, 8 Term Rep. 357, 101 Eng. Rep. 1432 (K. B., 1799); *Rex* v. *Smyth*, 5 C & P 201 (1832).

[2] Saskatchewan Statutes 1956, c. 68; Ontario Statutes 1954, c. 28, as amended by Statutes 1960-61, c. 28; New Brunswick Acts 1959, c. 6; Manitoba Acts 1960, c. 14.

[3] The closest law would seem to be the Malicious Damage Statute, Martin's Criminal Code (1961), Section 372 (1). But the requisite elements of damage would seem to be lacking here.

[4] Constitution of India, Article 15(2).

In Pakistan, the abrogation of the Constitution of 1956 by presidential proclamation in October, 1958 apparently struck out a constitutional right[5] to nondiscriminatory treatment. When the Constitution is fully restored this Right will be effective. However, a "sit-in" would appear not to come within the scope of existing criminal statutes.[6]

In Australia, there are either no state criminal trespass statutes[7] or state statutes which would not reach "sit-ins".[8]

In New Zealand, a "sit-in" might be criminal,[9] but there have been no reported cases of a factually similar nature.

In Ghana[10] and Nigeria,[11] freedom from racial discrimination is a constitutional right.

Only in the Union of South Africa would it be clear that a "sit-in" was criminal[12]—and here, significantly, the racial element is a factor in constituting the crime.

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[5] Article 14, Constitution of 1956.

[6] The requisite intent would appear to be lacking for a violation of the criminal trespass statute, Pakistan Criminal Code, s. 441. *Rahmatullah* v. *State*, 1958 P. L. D. Dacca 350.

[7] Western Australia and Queensland.

[8] The statutes in New South Wales (Inclosed Lands Protection Act, 1901-1939, s. 4) and Southern Australia (Trespassing on Lands Act 1928) apply only to "inclosed lands"—a very restrictive category. See 23 Australian Law Journal 357 (1949). Victoria's statute—Police Offenses Act 1958, s. 20(3)(d)—provides the defense of "supposition of right": See *Martin* v. *Hook*, 5 A. L. R. 6 (1899). Tasmania's statute—Trespass to Lands Act 1862—provides the defense of "reasonable excuse"; additionally, it may not be applicable to an urban setting.

[9] Police Offenses Act 1927, s. 6A; inserted by Police Offenses Amendment Act (No. 2) 1952, s. 3.

[10] Constitution of Ghana, Article 13, Declaration of Fundamental Principles.

[11] Constitution of Nigeria, Chap. III, Fundamental Rights, s. 27.

[12] Reservation of Separate Amenities Act, Act No. 49 of 1953, 3, Section 2(2), making it an offense for a person of one race wilfully to enter public premises or a public vehicle set aside for members of another race.

BRIEF FOR RESPONDENT

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In The

Supreme Court Of The United States

OCTOBER TERM, 1963

No. 9

CHARLES F. BARR, et al., PETITIONERS,

vs.

CITY OF COLUMBIA

No. 10

SIMON BOUIE and TALMADGE J. NEAL, PETITIONERS,

vs.

CITY OF COLUMBIA

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

BRIEF FOR RESPONDENT CITY OF COLUMBIA

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INDEX

	Page
STATEMENT	1
SUMMARY OF ARGUMENT	5
ARGUMENT:	
I. The Convictions of the Petitioners for Trespass and Breach of the Peace by the City of Columbia Did Not Deny to the Petitioners the Equal Protection of the Laws Because the City did not Participate in the Decision of the Drugstore Owners to Limit Their Food Counter Service to Persons of Only One Race	6
a. The record is free of any evidence of discrimination by the City in the use of its police powers, or the State in the employment of its judicial system, with respect to the Petitioners.	7
b. The City's protection of the rights of Proprietors under its police powers violated none of the rights preserved for Petitioners under the Fourteenth Amendment	8
(1) The private decisions of the Proprietors to refuse service to the Petitioners, whether or not discriminatory, lie within the permissive bounds of the Fourteenth Amendment	8
(2) The use of the City's police powers, on a non-discriminatory basis, to protect the property rights of its citizens from unlawful trespass is consistent with the commands of the Constitution of the United States and the denial of such protection, solely because of a customer's race, is forbidden by the Fourteenth Amendment	13

Page

c. The convictions in *Barr v. City of Columbia* involves no circumstances of official coercion. ... 19

II. The South Carolina Supreme Court has not Considered or Passed upon the Application of the Due Process Clause of the Statutes Involved ... 22

a. This Court, in reviewing a decision of the South Carolina Supreme Court, has no jurisdiction to consider questions not raised or passed upon by that Court ... 22

b. Whether or not the acts of Petitioners brought them within the prohibitions of the statutes under which they were charged was not raised or briefed to the South Carolina Supreme Court and was not decided by that Court ... 27

III. The Records before the South Carolina Supreme Court Support Petitioners' Convictions ... 30

a. Trespass ... 30

b. Breach of the Peace ... 32

CONCLUSION ... 34

APPENDIX A: *City of Columbia v. Barr*, Appellants' Brief ... I-A

APPENDIX B: *City of Columbia v. Bouie*, Appellants' Brief ... II-A

TABLE OF CASES

	Page
Alpaugh v. Wolverton, (Va. 1946) 184 Va. 943, 36 S.E. 2nd 906	10
Avent v. North Carolina, 373 U.S. 375	11, 17
Barbier v. Connolly, 113 U.S. 27	7, 15
Barrows v. Jackson, 346 U.S. 249	15
Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589	10
Boynton v. Virginia, 366 U.S. 454	17
Brown V. Meyer Sanitary Milk Co., 150 Kan. 931, 96 P. 2nd 651	11
Buchanan v. Warley, 245 U.S. 60	9, 14, 15
Burton v. Wilmington Parking Authority, 365 U.S. 715	5, 9, 10
Cantwell v. Connecticut, 310 U.S. 296	32
Central Union Tel. v. Edwardsville, 269 U.S. 190	27
City of Greenville v. Peterson, 239 S.C. 298, 122 S.E. 2nd 826	9, 29
Civil Rights Cases, 109 U.S. 3	9, 10
Coleman v. Middlestaff, 147 Cal. App. 2nd Supp. 833, 305 P. 2nd 1020	11
Columbia v. Barr, 239 S.C. 395, 123 S.E. 2nd 521	3, 11, 19
Columbia v. Bouie, 239 S.C. 570, 124 S.E. 2nd 332	5
De La Ysla v. Publix Theatres Corp., 82 Utah 598, 26 P. 2nd 818	10
Dorrance v. Pennsylvania, 287 U.S. 660	27
Duplex Printing Press Co. v. Deering, 254 U.S. 443	14
Echols v. Seaboard Air Line Railway Co., 174 S.C. 537, 178 S.E. 139	24
Edelman v. California, 344 U.S. 357	6, 26
Feiner v. N. Y., 340 U.S. 315	33
Fletcher v. Coney Island, 100 Ohio Appeals 259, 136 N.E. 2nd 344	11

	Page
Garner v. Louisiana, 368 U.S. 157	17, 33
Gober v. The City of Birmingham, 373 U.S. 374	11
Goff v. Savage, 122 Wash. 194, 210 P. 374	10
Griffin v. Collins, 187 F. Sup. 149 (D. Md. 1960)	10, 15
Hernandes v. Texas, 347 U.S. 475	12
Hodge Drive-It-Yourself Co. v. Cincinnati, 284 U.S. 335	8
Horn v. Illinois Central Railroad Co., 327 Ill. App. 498, 64 N.E. 2nd 574	11
Hucks v. Sellers, 236 S.C. 239, 113 S.E. 2nd 753	24
Hulbert v. Chicago, 202 U.S. 275	25
John v. Paullin, 231 U.S. 583	27
Liggett Co. v. Baldridge, 278 U.S. 105	15
Lombard v. Louisiana, 373 U.S. 267	11, 17, 22
Louisiana v. Texas, 176 U.S. 1	12
Madder v. Queens County Jockey Club N. Y., 1947, 296 N.Y. 249, 72 N.E. 2nd 697	10
Marsh v. Alabama, 326 U.S. 501	17
Marrone v. Washington Jockey Club, 227 U.S. 633	9, 10
McGoldrick v. Compagnie General Translantique, 309 U.S. 430	25
Musser v. Utah, 333 U.S. 95	27, 29
National Union of Marine Cooks and Stewards v. Arnold, 348 U.S. 37	8
Ochoa v. Morales, 230 U.S. 139	15
People v. Phillips, 284 N.Y. 235, 30 N.E. 2d 488	33
Peterson v. City of Greenville, 373, U.S. 244	9, 11, 17, 22
Priester v. Priester, 131 S.C. 284, 127 S.E. 18	24
Queenside Hill Realty Company v. Saxl, 328 U.S. 80	8
Quinlan v. Green County, 205 U.S. 410	12
R. H. Stearns Company v. U. S., 291 U.S. 54	12
Seegars v. WIS-TV, 236 S.C. 355, 114 S.E. 2d 502	24

TABLE OF CASES—Continued

	Page
Shelley v. Kraemer, 334 U.S. 1	6, 14, 15, 16
Shuttlesworth v. Birmingham, 373 U.S. ....., 10 L. Ed. 2d 335	17
Slack v. Atlantic White Tower System, Inc., 284 F. 2d 746 (4th Cir. 1960) affirming 181 F. Supp. 124 (D. Md. 1960)	10
Slaughterhouse Cases, 16 Wall 36	9, 13, 17
Snowden v. Hughes, 321 U.S. 1	7, 12
State v. Clyburn, (N.C. 1958) 101 S.E. 2d 295	10
State v. Edwards, 239 S.C. 339, 123 S.E. 2d 247	32
State v. Van Allen, 140 Conn. 586, 102 A 2d 526	33
Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350	7
Terminal Taxicab Co. v. Kutz, 241 U.S. 252	10
Terrell Wells Swimming Pool v. Rodriguez, (Tex. App.) 182 S.W. 2d 824	10
Thompson v. Louisville, 362 U.S. 199	17, 33
Traux v. Corrigan, 257 U.S. 312	14, 15
Turner v. City of Memphis, 369 U.S. 19	9
Turner v. Yates, 16 Howard 14	12
United States v. Arredonlo, 6 Pet. 691	12
United States v. Chemical Foundation, 272 U.S. 1	12
United States v. Cruikshank, 92 U.S. 542	9
United States v. Kessler, 213 F. 2d 53 (3rd Cir. 1952)	33
Western Turf Assn. v. Greenberg, 204 U.S. 359	8, 10
Williams v. Howard Johnson's Restaurant, 268 F. 2d 845 (4th Cir. 1959)	10, 11
Yakus v. United States, 321 U.S. 414	26
Younger v. Judah, 111 Mo. 303, 19 S.W. 1109	10

STATE STATUTES

Section 15-909, 1952 Code of Laws of South Carolina	3, 32
Section 16-386, 1952 Code of Laws of South Carolina	3, 23

TABLE OF CASES—Continued

OTHER AUTHORITIES

	Page
9 ALR 379 Annotated	11
15 CJS 616	12
Public Accommodations Bill, Testimony of Robert F. Kennedy Hearing before the Committee of Commerce, U.S. Senate, 88th Congress, First Session on S 1732, Part 1, page 74, July 1, 1963	17
Supreme Court of South Carolina, Rule 8 §2	23
Supreme Court of United States, Rule 10, paragraph 2	23

In The

Supreme Court Of The United States

OCTOBER TERM, 1963

No. 9

CHARLES F. BARR, et al., PETITIONERS,

vs.

CITY OF COLUMBIA

No. 10

SIMON BOUIE and TALMADGE J. NEAL, PETITIONERS,

vs.

CITY OF COLUMBIA

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

STATEMENT

These cases arise out of convictions of the Petitioners in the City Recorder's Court in Columbia, South Carolina, for trespass and breach of the peace in connection with "sit-in" demonstrations at the lunch counters of two private drug stores. The relevant facts in each case are quite similar and, for the most part, are fully summarized in the opinions of the South Carolina Supreme Court, from which we quote.

1. *Barr v. City of Columbia*

"The charges grew out of a 'sit-down' demonstration staged by appellants at the lunch counter of the Taylor

Street Pharmacy in the City of Columbia, a privately owned business. In addition to selling articles usually sold in drug stores, this establishment maintains a lunch counter in the rear, separated from the front of the store by a partition. The customers sit on stools. The policy of this store is not to serve Negroes at the lunch counter although they are permitted to purchase food and eat it elsewhere. In a sign posted the privilege of refusing service to any customer was reserved.

"Shortly after noon on March 15, 1960, appellants, then college students, according to a prearranged plan, entered this drugstore, proceeded to the rear and sat down at the lunch counter. The management had heard of the proposed demonstration and had notified the officers. To prevent violence, three were present when appellants entered. As soon as they took their seats several of the customers at the counter, including a White woman next to whom one of appellants sat, stood up. The manager of the store then came back to the lunch counter. He testified that the situation was quite tense, that you 'could have heard a pin drop in there', and that 'everyone was on pins and needles, more or less, for fear that it could possibly lead to violence.' He immediately told appellants that they would not be served and requested them to leave. They said nothing and continued to sit. At the suggestion of one of the officers, the manager then spoke to each of them and again requested that they leave. One of them stood up and inquired if he could ask a question. As this was done, the other four appellants arose. The manager replied that he did not care to enter into a discussion and a third time told appellants to leave. Instead of doing so, they resumed their seats. After waiting several minutes, the officers arrested all of them and took them to jail.

"The foregoing summary is taken from the testimony offered by the State. Only two of the appellants testified. They denied that the manager of the store requested them to leave. They testified that an employee at the lunch coun-

ter stated to them, 'You might as well leave because I ain't going to serve you', which they did not construe as [fol. 66] a specific request. [Barr R. 26, 29, 32-33] They said after it became apparent that they were not going to be served, they voluntarily left the lunch counter and as they proceeded to do so, were arrested. They denied that any of the White customers got up when they sat down, stating that these customers did so only after the employee at the lunch counter said: 'Get up, we will get them out of here.' [Barr R. 25]" *Columbia v. Barr*, 239 S. C. 395, 397, 123 S. E. (2d) 521, 522, 523.

In addition, the two Petitioners testified that they had previously made purchases in the store, Barr R. 25, 34, and one said he had purchased food at the lunch counter to take out. Barr R. 34. Both stated that on this occasion their sole purpose in entering the store was to be served food at the counter. Barr R. 25, 31, 36.

Based on this evidence, the Petitioners were convicted of Trespass under Sec. 16-386 of the 1952 Code of Laws of South Carolina and Breach of the Peace under Sec. 15-909 of the 1952 Code of Laws of South Carolina. Each was sentenced to pay a fine of $100.00 or serve 30 days in jail on each charge, with $24.50 of each fine being suspended. Barr R. 42. The Richland County Court affirmed the conviction. Barr R. 46-51. The South Carolina Supreme Court refused to consider, as too vague, exceptions directed to the merits of the convictions. Barr R. 55-56. That Court affirmed the lower Court's decision on the question of whether the City's actions denied Petitioners equal protection under the Fourteenth Amendment. Barr R. 56. *Columbia v. Barr*, 239 S. C. 395, 123 S. E. (2d) 521.

2. *Bouie v. City of Columbia*

"The appellants Simon Bouie and Talmadge J. Neal, Negro college students, were arrested on March 14, 1960, and charged with trespass (Code 1952, Section 16-386 as amended) and breach of the peace (Code, 1952, Section

15-909). Bouie was also charged with resisting arrest. On March 25, 1960, they were tried before the Recorder of the City of Columbia, without a jury. Both were found guilty of trespass; Bouie guilty also of resisting arrest. Bouie was sentenced to pay a fine of one hundred ($100.00) dollars or to imprisonment for thirty (30) days on each charge, twenty-four and 50/100 ($24.50) of each fine being suspended and the prison sentence to run consecutively. Neal was sentenced to pay a fine of one hundred ($100.00) dollars, of which twenty-four and 50/100 ($24.50) was suspended, or to imprisonment for thirty (30) days. On appeal to the Richland County Court the judgment of the Recorder's Court was affirmed by order dated April 28, 1961, from which this appeal comes.

"Eckerd's, one of Columbia's larger drugstores, in addition to selling to the general public drugs, cosmetics and other articles usually sold in drugstores, maintains a luncheonette department. Its policy is not to serve Negroes in that department.

"On March 14, 1960, about noon, the appellants entered this drugstore and sat down in a booth in the luncheonette department for the purpose, according to their testimony, of ordering food and being served. Neal testified that it was his intention to be arrested; [Bouie R. 35] Bouie testified that he knew of the store's policy not to serve Negroes in that department, and that it was his purpose also to be arrested 'if it took that'. [Bouie R. 45] No employee of the store approached them, and they continued to sit in the booth for some fifteen minutes, each with an open book before him, when the manager of the store came up, in company with a police officer, told them that they would not be served, and twice requested them to leave. Upon their ignoring such request, the police officer asked them to leave, which request brought no result other than the query 'for what' from Bouie. The police officer then told them to leave and that they were under arrest. Thereupon Neal closed his book and got up; Bouie did not, and the

officer thereupon caught him by the arm and lifted him out of the seat. Bouie's book being still on the table, he was permitted to get it; and the officer then seized him by the belt and proceeded to march him out of the store. Bouie testified that he made no resistance, but only said to the officer when the latter had hold of his belt, 'That's all right, Sheriff, I'll come on'. [Bouie R. 42] The officer testified that Bouie said: 'Don't hold me, I'm not going anywhere', and that after they had proceeded a few steps he 'started pushing back and said "Take your hands off me, you don't have to hold me.'" [Bouie R. 4] *Columbia v. Bouie*, 239 S. C. 570, 572, 573, 124 S. E. (2d) 332.

The South Carolina Supreme Court reversed the conviction of Bouie for resisting arrest and affirmed both trespass convictions. *Columbia v. Bouie*, 239 S. C. 570, 574, 124 S. E. (2d) 332, 333.

SUMMARY OF ARGUMENT

I

Neither the action of the City of Columbia in arresting and convicting the Petitioners for trespass or for breach of the peace nor the action of the South Carolina Courts in affirming these convictions deprived any petitioner of equal protection.

The conduct of the Proprietors of privately owned drug stores in limiting service at its lunch counters to members of one race and in declining counter service to those of another race "* * * does no violence to the Equal Protection Clause." *Burton v. Wilmington Parking Authority*, 365 U. S. 715, 722. The action of City or State officers in arresting Petitioners after they have violated the state trespass and breach of peace statutes by refusing to leave privately owned property, after timely requests from the Proprietors to leave, does not make the state a participant in the Proprietors' decision not to serve the Petitioners at its lunch counters.

The use of the judicial machinery of the state in convicting Petitioners of trespass and breach of the peace does not constitute state action denying the Petitioners equal protection within the meaning of *Shelley v. Kraemer*, because in *Shelley* the state court participated in the decision to discriminate by choosing to enforce the racial covenant rather than the Negro plaintiff's property right, while in *Barr* and *Bouie* the decision not to serve the Petitioners was made by private individuals.

The commands of the Fourteenth Amendment do not require a state to prohibit private discrimination by its citizens.

II

In order for the Court to consider the question of whether a state statute is so vague as to deprive a defendant in a criminal case of due process of law or the question of whether the evidence was sufficient to convict the questions must have been raised and preserved in the state court. "This Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law." *Edelman v. California*, 344 U. S. 357.

III

The evidence presented in both *Barr* and *Bouie* was sufficient to support the convictions of each of the Petitioners for trespass and for breach of the peace.

ARGUMENT

I

THE CONVICTIONS OF THE PETITIONERS FOR TRESPASS AND BREACH OF THE PEACE BY THE CITY OF COLUMBIA DID NOT DENY TO THE PETITIONERS THE EQUAL PROTECTION OF THE LAWS BECAUSE THE CITY DID NOT PARTICIPATE IN THE DECISION OF THE DRUG STORE OWNERS TO LIMIT THEIR FOOD COUNTER SERVICE TO PERSONS OF ONLY ONE RACE

a. *The record is free of any evidence of discrimination by the City in the use of its police powers, or the State in the employment of its judicial system, with respect to the Petitioners.*

The record is completely void of any evidence of discrimination by the City in the use of its police powers to enforce the Trespass Statute. To the contrary, the evidence clearly indicates that Petitioners were arrested because of their status as trespassers, not because of their race.[1]

Certainly, there is no evidence of any deliberate or intentional discrimination against Negroes in enforcing the Trespass Law, which this Court has heretofore found necessary to constitute a denial of equal protection.

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination . . . [A] discriminatory purpose is not presumed [citations omitted]. There must be a showing of "clear and intentional discrimination." . . . [A] mere showing that Negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race. *Snowden v. Hughes*, 321 U. S. 1, 8-9.

In the absence of such a showing, good faith of the police officers in the administration of their duties is presumed. *Sunday Lake Iron Company v. Wakefield*, 247 U. S. 350; *Barbier v. Connolly*, 113 U.S. 27.

Petitioners have made no showing that the Trespass Law (admittedly fair on its face, Pet. Br. p. 44) either has been or would have been enforced differently as to others, regardless of their race, similarly situated who refused to leave the

[1] Q. Chief, did you personally have any objection to these defendants sitting where they were seated?
A. Personally, no.
Q. So it didn't make any difference to you where they sat?
A. No sir, not from a police standpoint. (Bouie 15)

See also Barr 6, 13, 16.

premises on the Proprietor's request. Absent such a showing, neither the statute itself nor the City's enforcement can be deemed in violation of Petitioners' rights under the Fourteenth Amendment. *National Union of Marine Cooks and Stewards v. Arnold*, 348 U. S. 37; *Western Turf Association v. Greenberg*, 204 U.S. 359.

Nor is there any merit in Petitioners' suggestion that the law would not be equally effective in its operation as to other similarly situated. (Pet. Br. p. 44) Clearly, a white person in Petitioners' position would be subject to prosecution. In any event, a "claim of repugnancy to the equality clause cannot be supported by mere speculation or conjecture." *Hodge Drive-It-Yourself Company v. Cincinnati*, 284 U. S. 335, 338. See also *Queenside Hills Realty Company v. Saxl*, 328 U. S. 80.

Finally, there is no evidence of a denial of "equal protection" or "due process" in the prosecution of the charges against the Petitioners through the courts of South Carolina. In each case Petitioners were awarded a complete and impartial hearing at every level of the State judicial machinery.

Thus, the record is free of any evidence of a denial of equal protection by the City or the State in the enforcement of the South Carolina Trespass Act.

b. *The City's protection of the rights of Proprietors under its police powers violated none of the rights preserved for Petitioners under the Fourteenth Amendment.*

(1) The private decisions of the Proprietors to refuse service to the Petitioners, whether or not discriminatory, lie within the permissive bounds of the Fourteenth Amendment.

The decisions of the Proprietors to refuse service to Petitioners in their private establishments were made as private citizens. Since its enactment, this Court has consistently and repeatedly construed the Fourteenth Amendment as never having been intended to prohibit such private choices, whether or not discriminatory.

> Its [Fourteenth Amendment] sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, *neither more nor less*, shall be the measure of the rights of the citizens of other states within your jurisdiction. *Slaughterhouse Cases*, 16 Wall 36, 77. [Emphasis added.]

> The Fourteenth Amendment prohibits a State from depriving any person of life, liberty or property, without due process of law; *but this adds nothing to the rights of one citizen against another. U. S. v. Cruikshank*, 92 U. S. 542, 554.[2] [Emphasis added.]

Among its first decisions after the enactment of the Fourteenth Amendment, this Court was faced with the identical question raised here—the extent of the right of proprietors of private establishments, under that Amendment, to discriminate if they saw fit among their customers. In *The Civil Rights Cases*, 109 U. S. 3, this Court squarely decided that proprietors of private establishments had every right, under the Fourteenth Amendment, to choose their customers on any basis they saw fit, whether or not discriminatory or wrongful, and, in so holding, said:

> In this connection it is proper to state that civil rights, such as are guaranteed by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs or judicial or executive proceedings. *The wrongful act of an individual, unsupported by any such authority is simply a private wrong, or a crime of that individual* . . . p. 17 [Emphasis added.]

[2] See for example *Civil Rights Cases*, 109 U. S. 3; *Marrone v. Washington Jockey Club*, 227 U. S. 633; *Buchanan v. Warley*, 245 U. S. 60; *Burton v. Wilmington Parking Authority*, 365 U. S. 715; *Turner v. City of Memphis*, 369 U. S. 19; *Peterson v. City of Greenville*, 373 U. S. 244.

That this case is controlling of the issues raised as to the violation of the Petitioners' "equal protection" rights under the Fourteenth Amendment is recognized in their request that it be overruled as to this holding. However, its continuing force and validity was reiterrated as recently as April 1961 when, in the language of Justice Clark, this Court said:

> The Civil Rights Cases . . . "embedded in our constitutional law" the principle that the action inhibited by the first Section [Equal Protection Clause] of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. *That Amendment erects no shield against merely private conduct, however discriminatory or wrongful . . . Burton v. Wilmington Parking Authority*, 365 U. S. 715, 721. [Emphasis added.]

This right of the private proprietor to determine his customers has been sustained by this Court on several occasions. *Terminal Taxicab Company v. Kutz*, 241 U. S. 252 (private automobile leasing business per Justice Holmes); *Marrone v. Washington Jockey Club*, 227 U. S. 633 (race track proprietor); *Western Turf Association v. Greenberg*, *supra* (race track proprietor). Likewise, other courts have consistently upheld the proprietor's right, under the Fourteenth Amendment, to discriminate among his customers. *Slack v. Atlantic White Tower System, Inc.*, 284 F. 2d 746 (4th Cir. 1960) affirming 181 F. Supp. 124 (D. Md. 1960); *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir. 1959); *State v. Clyburn*, (N. C. 1958), 101 S. E. 2d 295; *Madden v. Queens County Jockey Club*, (N. Y. 1947), 72 N. E. 2d 697; *Alpaugh v. Wolberton*, (Va. 1946); 36 S. E. 2d 906; *Griffin v. Collins*, 187 F. Supp. 149 (D. Md. 1960). See also *Terrell Wells Swimming Pool v. Rodriquez*, (Tex.) 182 S.W. 2d 824; *Booker v. Grand Rapids Medical Colleve*, 156 Mich. 95, 120 N.W. 589; *Younger v. Judah*, 111 Missouri 303, 19 S. W. 1109; *Goff v. Savage*, 122 Wash. 194, 210 P. 374; *De La Ysla v. Public Theatres Corporation*,

82 Utah 598, 26 P. 2d 818; *Brown v. Meyer Sanitary Milk Company*, 150 Kan. 931, 96 P. 2d 651; *Horn v. Illinois Central Railroad Company*, 327 Ill. App. 498, 64 N. E. 2d 574; *Coleman v. Middlestaff*, 147 Cal. App. 2d Supp. 833, 305 P. 2d 1020; *Fletcher v. Coney Island*, 100 Ohio App. 259, 136 N. E. 2d 344. Annotation, *Right to Reject Customer from Store*, 9 ALR 379.

Even in its decisions of the previous term, which extend the doctrine of "state action" to its outermost limits, this Court was careful not to infer that the proprietor's right to refuse service was in any way restricted under the Fourteenth Amendment. *Avent v. North Carolina*, 373 U. S. 375; *Gober v. The City of Birmingham*, 373 U. S. 277; *Lombard v. Louisiana*, 373 U. S. 267; *Peterson v. City of Greenville*, 373 U. S. 244. Instead, the Court was careful, in each case, to ground its decision on a state statute, city ordinance, or other official action which effectively prevented the free exercise of private choice. The records here are devoid of such state or official restriction on the private decisions of the Proprietors.

Petitioners recognize this fatal absence of any state or official coercion in these records and seek to substitute, in lieu thereof, as restricting such free choice, "custom." (Pet. Br. 25-33) This "custom" they would, in turn, trace to state law for its source and origin, thereby finding state "coercion" of the Proprietors in their decisions not to serve the Petitioners. Examination of this novel doctrine reveals its weaknesses.

> The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment. Soper, Circuit Judge. *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845, 848.

Furthermore, the record contains absolutely no evidence of any widespread "custom" of discrimination at lunch counters in the City of Columbia which can be traced to

state law.[3] None of the South Carolina statutes cited by Petitioners (Pet. Br. p. 30) require such segregation and no discriminatory requirements can be found in the City of Columbia Ordinances.[4] Nor have Petitioners cited any pre-existing Acts of the South Carolina Legislature which could have constituted the origin of such "custom."[5] In fact, the record shows that Petitioners were, and had been for some time, freely served in other departments of the Proprietors' stores and had received food at the lunch counters to take out. (Barr R. 25, 34. Bouie R. 27, 43).[6]

Even if such a "custom" did exist, among the basic precepts of our jurisprudence are those which recognize that custom is one of our principal *sources* of law, *U. S. v. Arredonlo*, 6 Pet. 691, 714-715; 15 CJS 616, and that our democratic governments and their laws are *the products of the choices* of our citizens, not vice versa as Petitioners contend. (Pet. Br. p. 28) While Petitioners' proposition might be true in the case of some modern totalitarian systems, the reverse is not yet true under our democratic structure. Certainly, to attribute to the state, in the absence of any affirmative State coercion, the Constitutional responsibility for the private decisions of its citizenry, if concurred in by sufficient number to constitute a "custom" would indeed

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[3] Clearly, the existence of a City Ordinance in the Town of Greenville, South Carolina, does not create a "custom" in Columbia, as Petitioners suggest. (Pet. Br. p. 29-30)

[4] Petitioners' authorities would indicate that no such custom ever existed (Pet. Br. p. 28-29)

[5] In this connection, Petitioners would attribute to the City the responsibility of any pre-existing state legislation on the subject of segregation, even though no longer in effect. (Pet. Br. p. 26)

[6] If such "custom" exists, Petitioners would place the burden on the Proprietors to prove that their choice was not because of "custom"— i.e., that the Proprietors' preferences were for personal reasons, and not because of the concurrence of the majority of their fellow citizens. But what basis of such a decision to refuse Petitioners service could be more "personal" to a proprietor of a restaurant or lunch counter than that of the business success of his undertaking, which must necessarily reflect the preferences of a majority of his customers. In any event, such an approach is in conflict with the long established presumption of the Constitutionality of the conduct in question. See e.g.; *Hernandez v. Texas*, 347 U. S. 475; *Snowden v. Hughes, supra; R. H. Stearns Company v. U. S.*, 291 U. S. 54; *U. S. v. Chemical Foundation*, 272 U. S. 1; *Quinlan v. Green County*, 205 U. S. 410, *Louisiana v. Texas*, 176 U. S. 1; *Turner v. Yates*, 16 Howard 14.

" . . . transfer the security and protection of all civil rights which we have mentioned from the states to the federal government . . ." and "fetter and degrade the state governments by subjecting them to control of Congress, and the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character . . . " and further " . . . radically change[s] the whole theory of the relations of the state and federal governments to each other and of both these governments to the people . . . ", a step which this Court has refused to take. *Slaughterhouse Cases*, 16 Wall 36, 77-78.

However, even if we assume the correctness of the Petitioners' proposition that the state is responsible for the "customs" of its people, what Petitioners are really saying is that if a majority of the citizens of a given locality concur in the Proprietors' private decisions, then those decisions are not of the Proprietors' free choice, but are rather the result of "state action" (or inaction), and therefore, if based on racial considerations, prohibited by the Fourteenth Amendment. If, however, those decisions are not concurred in by sufficient members of the locality such as to be deemed a "custom," even though they be based on considerations of racial discrimination, then they lie within the permissible bounds of the Fourteenth Amendment.

We respectfully submit that no such result was ever intended by the framers of the Fourteenth Amendment and that nothing therein prohibits the private decisions of the Proprietors reflected in these records in no way influenced by the State of South Carolina or the City of Columbia.

(2) The use of the City's police powers, on a non-discriminatory basis to protect the property rights of its citizens from unlawful trespass is consistent with the commands of the Constitution of the United States and the denial of such protection, solely because of a customer's race, is forbidden by the Fourteenth Amendment.

Beyond question, the businesses of the lunch counter proprietors constitute property rights in every sense, entitled to protection from unlawful injury or interference. *Truax v. Corrigan*, 257 U. S. 312; *Duplex Printing Press Company v. Deering*, 254 U. S. 443. The decisions of the Proprietors to refuse service to Petitioners, whether or not discrimnatory, were made in the ordinary conduct of their businesses and constitute, as heretofore shown, lawful exercise of their property rights in connection with these businesses.

That the protection of such property rights was one of the basic purposes of the Fourteenth Amendment has frequently been recognized by this Court, as has the obvious fact that such protection must necessarily preserve the lawful enjoyment of such rights.

> It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. *Shelley v. Kraemer*, 334 U. S. 1, 10.
>
> Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property. *Holden v. Hardy*, 169 U. S. 366. Property consists of the free use, enjoyment and the disposal of a person's acquisitions without control or diminution save by the law of the land. *Buchanan v. Warley*, 245 U. S. 60, 74.

Of course, such protection of lawful property rights must be just that. To remove that protection, whether in the form of police power or judicial remedial rights is, in effect, to deprive the owner of the property itself. This is precisely what Petitioners request of this Court.

While Petitioners do not question the City's use of its police powers to eject white trespassers on the Proprietors' property, they would deny its use to protect the property from Negro trespassers. In short, *because* of the customer's race, the Proprietor loses his right to police protection and thus the enjoyment of his property, even though, as heretofore shown, the decision to exclude that customer was itself lawful.[7] Is this not a deprivation of the Proprietors' property for the benefit of the trespassers solely because of the trespassess' race? Such is exactly what the Fourteenth Amnedment prohibits.

> Thus, the guaranty was intended to secure equality of protection not only for all, but against all similarly situated. Indeed, protection is not protection, unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class. *Truax v. Corrigan*, supra, page 333.

See also *Shelley v. Kraemer, supra; Buchanan v. Warley, supra; Barrows v. Jackson*, 346 U. S. 249; *Liggett Co. v. Baldridge*, 278 U. S. 105; *Ochoa v. Morales*, 230 U. S. 139; *Barbier v. Connolly, supra.*

Petitioners would justify this result on the theory that the Proprietors' decisions, even though lawful, are discriminatory and that their enforcement under the police powers constitutes prohibited "state action," within the meaning of *Shelley v. Kraemer, supra.* However, the distinction is clear. In *Shelley*, the discriminatory decision was actually made in part by the state. The state was faced with

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[7] Presumably, the Proprietors would still be free to refuse service or employ "self help" to eject the trespasser. Can this possibly be deemed adequate protection from the economic effect on the Proprietor's business of the presence of unwanted customers on other customers? In any event, it is inconceivable that while one may use "self help" to enforce his rights, he may not call upon a peace officer for the same purpose. See *Griffin v. Collins*, 187 F. Supp. 149 (D. Md. 1960).

two choices—whether to deprive a Negro of his property, lawfully acquired, solely because of his color by enforcing a private covenant, or whether to protect the lawful property rights of the Negro at the expense of refusing to enforce the contractual rights of his neighbors. In choosing to sustain the former value, the state actually participated in the decision to discriminate.

The Court carefully pointed up this distinction:

> The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing. *Shelley v. Kraemer*, supra, p. 19.

Here, however, there has been absolutely no participation by the City of any discriminatory decision. The lawful decisions to refuse Petitioners service and the requests that they leave the premises, even though based on racial consideration, were solely those of the Proprietors, in which the City played no part. When Petitioners refused to leave, only then did they become trespassers and only then did the City enter the picture. As trespassers, Petitioners were subject to police action, regardless of their color, and the City's enforcement of the trespass law in no way involved discriminatory conduct or decisions on its part. The sole effect of the City's conduct was to obviate the Proprietors' rights to use "self help" in protecting their property which could have resulted in violence. In short, the "state action" involved here is limited to the non-discriminatory exercise of police powers to avoid violence and has no connection with the lawful, if discriminatory, private

decisions of the Proprietors to request Petitioners to leave their premises.[8]

Apparently, Petitioners recognize that these cases involve no discriminatory conduct on the part of the state prohibited by the Fourteenth Amendment. For this reason, they would abandon the entire concept of "state action", as it now exists and would impose upon the states, under the Fourteenth Amendment, the affirmative duty to prevent all forms of "public" discrimination, especially those which involve what Petitioners term the "narrow" or "technical" property rights of others. (Pet. Br. p. 33-48.)[9] However, beginning with its first interpretation of the Fourteenth Amendment in the *Slaughterhouse Cases*, 16 Wall 36, this Court has consistently held that the Amendment created no new rights among the private citizens of the state as to each other, but was designed solely to prevent actual discrimination by the states themselves.[10]

Nor is this Court faced here with the assertion by Petitioners of any established constitutional right which the states are required to protect, such as that raised in *Marsh v. Alabama*, 326 U. S. 501. We know of no constitutional

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[8] This Court must have recognized this obvious distinction from the Shelley decision. In none of its recent decisions involving a private establishment has the Court concluded that the mere enforcement of the criminal law, without more, constituted prohibited "state action." See *Boynton v. Virginia*, 364 U. S 454; *Shuttlesworth v. Birmingham*, 373 U. S. 262; *Avent v. North Carolina*, 373 U. S. 375; *Thompson v. Louisville*, 362 U. S. 199; *Garner v. Louisiana*, 368 U. S. 157; *Peterson v. Greenville, supra; Lombard v. Louisiana, supra.*

Likewise, the Attorney General of the United States recognized this difference in his testimony regarding the pending "Public Accommodations Bill":

> I would point out to you the Fourteenth Amendment says there has to be action by the State . . .
>
> * * * * *
>
> . . . You have to have action by the State under the Fourteenth Amendment. It is not just individual action. It has to be action by the State You can make an argument, for example, that all the State did was give a business a liquor license. They didn't tell them that they should go ahead and discriminate. The argument would be that it was not action by the State to permit them to discriminate.
>
> Testimony of Robert F. Kennedy, Hearings Before the Committee on Commerce, United States Senate, Eighty-Eighth Congress, First Session on S. 1732, Part 1, page 74, July 1, 1963.

[9] It is noteworthy that these are the same "narrow" or "technical" rights protected by this Court in *Shelley*.

[10] See footnote 2.

right to be free of "inconvenience" or "humiliation," especially where one enters the private business of another against the owner's known wishes for the purpose of protesting the manner in which that business is run.[11] Neither is there any constitutional prohibition of discrimination, on any basis, among private individuals, whether such discrimination occurs in public or in the privacy of one's living room.[12]

Unquestionably, the state has the right to abolish the private discrimination of which Petitioners complain. As they indicate, this has been accomplished in many states, (Pet. Br. p. 37-38) but always by the use of the ballot and the legislative process. If indeed there is a "felt need and apprehension" (Pet. Br. p. 58) on the part of Petitioners for relief, their remedy lies in their participation in the elective and legislative processes of the state governments, not in a distortion of the United States Constitution which has the sole effect of placing the federal government, through its courts and Acts of Congress, in the business of regulating all the relationships and aspects of the private individuals to each other. In the apt language of this Court:

> When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of a cause, and when his rights, as a citizen or a man, are to be protected in the ordinary modes by which other men's rights are protected. *Civil Rights Cases, supra*, p. 25.

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[11] Petitioners testified they had frequented the establishment involved and they must therefore have known of the Proprietors' policies against serving Negroes at the lunch counter. See Barr 25, 34, 30; Bouie 27, 43. In fact, the obvious purpose of their presence was to protest this policy.

[12] See footnote 2.

Petitioner apparently would permit racial discrimination in the living room. (Pet. Br. p. 56) But where is the basis for such a distinction? The public "private" business property supports the living room. The latter cannot exist without the former. Is one a more "narrow" or "technical" property interest than the other?

Clearly, this record presents no case of unconstitutional conduct on the part of the City.

c. *The convictions in Barr v. City of Columbia involve no circumstances of official coercion.*

Petitioners seek to isolate special circumstances in *Barr v. City of Columbia* (No. 9) to justify a finding of "state action" on the part of the arresting officers. They suggest that the proprietor's decision was, in effect, coerced by the police. The record will not support such a contention.

The Proprietor testified:

> Page 17. Q. Had you informed Mr. Stokes [the arresting officer] prior to the defendants coming in, that you were not going to serve them, and that you wanted them to leave?
>
> A. That's correct. I was informed on Monday that they would be there at 12:35 Tuesday, under their plans, etc.
>
> Page 20-21 . . . I was informed on Monday, that a demonstration was planned for the Taylor Street Pharmacy at 12:35. Didn't say what date.
>
> Q. Based upon your information you then asked the assistance of the Police Department and other officers?
>
> A. That's correct.
>
> Q. And the police officers who were in your store on March 15, 1960, were there at your request?
>
> A. Well, I would say yes or no. I mean they came and informed me of the demonstration and we were working as a group. I'll put it that way. I didn't call them to come around and inform me. They informed me in advance.
>
> Q. When you say working together, you requested their assistance in preventing this demonstration?
>
> A. Not necessarily a demonstration. Any type of violence could erupt or anything, against my store policy. It could create violence.

Q. Anything against your store policy, you then wished the officers to assist you in preventing?

A. That's correct.

Q. So you then requested their assistance?

A. I would put it that way, yes. I wanted them there. Let's put it that way.

Page 23. Q. You told them to move and they refused, did you ask them then to arrest them?

A. We had a previous agreement to that effect, that if they did not leave, they would be placed under arrest for trespassing.

Q. You had already agreed with the Police Department—

A. If we had a demonstration, if we requested them to leave and they refused, then they would be arrested.

Q. So in fact you had instructed the Police Department to arrest them if they refused to leave at your request?

A. Not necessarily, I had instructed them but that was an agreement pertaining to the law enforcement division.

Q. You let the Police Department know that that was your wish?

A. That I would not serve them.

Q. And if they did not leave when you asked them, you wanted them arrested?

A. That's correct.

Clearly, the decision not to serve Petitioners and to request their departure was purely that of the Proprietor.[13]

Nor is the situation altered by the fact that the Proprietors requested the presence of the officers in advance of the demonstration. Having been alerted of the exact time of the demonstration (Barr R. 17, 20-21), it was perfectly reasonable and proper for the Proprietor to have police help

[13] This testimony was corroborated by the police officer who was present:

Page 9. A. . . . Before they came in, the manager or the owner, Mr. Terry, had told me that he wasn't going to serve them and that he wanted them out of his store, if they came back.

on hand at the time of the demonstrator's arrival, rather than await their actual presence before calling for police protection.

Neither is there any evidence of the police officers counseling the Proprietor to secure evidence of a crime. Before the police intervened in any way, the Proprietor first, on his own, instructed Petitioners to leave. (Barr R. 3-4, 12-14, 17). Only after Petitioners refused his request did the officers intervene to ask the Proprietor to instruct each individual again to make sure that each had heard the request. (R. 4).

The arresting officer testified:

Pages 14-15. Q. State your reason for doing so?

A. Why I asked them to leave?

Q. Yes?

A. As I stated before, he had informed me that he wasn't going to serve them and that he wanted them out of his store. All right, after he had made the statement to all of them, they sat there like maybe they didn't hear him. The others had started to get up, the white customers stood up, and the reason I asked to tell them again so that they would know that he wasn't going to serve them and wanted them to leave.

Q. In fact, you were assisting him in refusing them service in asking them to leave?

A. I wouldn't say I was assisting him.

Q. What was your point in being certain that they heard him?

A. So that whenever they didn't leave and they had been asked to leave, well I heard him ask them to leave and they ignored him. He's the owner of the store and as I said, my purpose was there to prevent violence, but at that particular point they refused to leave and it seemed to me another law was being broken.

Q. What was that law?

A. They were trespassing.

Q. Are you familiar with the trespass law?

A. No, I don't say I'm all familiar with it.

Q. It was an ever present factor in your mind that day?

A. I wouldn't say it was ever present. I tried to keep all the laws. I don't say all of them, but I tried to keep most of them in my mind.

Q. You did however, assist the manager in refusing service to these defendants, didn't you?

A. I won't say I assisted him in refusing service.

The officer's request for a repetition of the instructions was clearly for Petitioners' own benefit—to afford them every opportunity to avoid being arrested solely because of a failure to hear the Proprietor's instructions. Only after the Petitioners had obviously heard the request to leave and still deliberately refused to depart did the officers act. Clearly, this record reflects no circumstances comparable to those found in *Lombard v. Louisiana, supra*, and *Peterson v. Greenville, supra*.

II

THE SOUTH CAROLINA SUPREME COURT HAS NOT CONSIDERED OR PASSED UPON THE APPLICATION OF THE DUE PROCESS CLAUSE TO THE STATUTES INVOLVED

The Petitioners and the United States as Amicus Curiae take the position that the statutes underlying the convictions of Petitioners are unconstitutionally vague as applied to Petitioners in this action in that the wording of the statutes and their interpretation by the courts of South Carolina gave no notice to the Petitioners that their acts in these cases were in violation of the statutes, thereby depriving them of rights guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States. This position is without merit.

a. *This Court, in reviewing a decision of the South Carolina Supreme Court, has no jurisdiction to consider questions not raised or passed upon by that Court.*

In the record of these cases the question of the constitutionality of the Trespass Statute, Section 16-386, Code of Laws, South Carolina, 1952, is first raised in the Petition for Writ of Certiorari. The question was not presented to the South Carolina Supreme Court and was not decided by that Court.

Rule 8, Section 2, of the Rules of the Supreme Court of South Carolina states:[14]

> The Brief of Appellant shall be preceded by a statement of the questions involved.
>
> . . . Ordinarily, no point will be considered which is not set forth in the statement of the questions involved or suggested thereby.

In the *Barr* case, the pertinent statement was as follows (Appendix I-A):

QUESTIONS INVOLVED

> I. Did the court err in refusing to hold that under the circumstances of this case, the arrest and convictions of appellants were in furtherance of a custom of racial segregation, in violation of the Fourteenth Amendment to the United States Constitution? (Exceptions 3, 4)
>
> A. Was the enforcement of segregation in this case by State Action within the meaning of the Fourteenth Amendment?
>
> B. Were the appellants unwarrantedly penalized for exercising their freedom of expression in violation of the Fourteenth Amendment?"

In the *Bouie* case, the pertinent statement was as follows (Appendix 13A):

QUESTIONS INVOLVED

> Did the court err in refusing to hold that under the circumstances of this case the arrest and convictions of appellants were in furtherance of a custom of racial

[14] This Court has a rule to the same effect. Supreme Court Rule 10, paragraph 2.

segregation, in violation of the Fourteenth Amendment of the United States Constitution? (Exceptions 3 and 4)

A. Did the conviction of appellants of the charge of trespass constitute State action within the meaning of the Fourteenth Amendment to the United States Constitution?

B. Did the application of appellants of the trespass statute, under the circumstances of this case, amount to a violation of appellants' constitutionally protected right of freedom of expression?

No question is raised as to the vagueness of the statutes by either of the above statements, nor is any such question argued or pressed by the briefs of the Petitioners (appellants below) which are printed as an appendix hereto.

The South Carolina Supreme Court has consistently held that questions which are not argued in printed briefs will not be considered even though the questions have been initially raised by exceptions.

In *Priester v. Priester*, 131 S. C. 284, 127 S.E. 18, the Court said:

> No exceptions in the matter of the appeal from the order of the Circuit Judge settling the case for appeal were argued in appellant's printed briefs. Any assignment of error in that regard must, therefore, be deemed abandoned.

In *Echols v. Seaboard Air Line Railway Co.*, 174 S. C. 537, 178 S.E. 139, the Court said:

> This is the only question which appellant has argued in his printed brief. Therefore, under the rules and decisions of this Court, all other exceptions are deemed abandoned. Supreme Court Rule 8, Secs. 2 and 4. *Priester v. Priester*, 131 S. C. 284, 127 S.E. 18.

See also *Hucks v. Sellers*, 236 S. C. 239, 113 S.E. (2d) 753 and *Seegars v. WIS-TV*, 236 S. C. 355, 114 S.E. (2d) 502.

In the cases here being reviewed, the question of the constitutionality of the statutes had not even been raised

by the exceptions to the order of the Richland County Court. (Barr R. 51-52) (Bouie R. 63)

Having established that this question was not considered or passed upon by the South Carolina Supreme Court, it necessarily follows that this Court cannot now consider it in reviewing the decision of that Court.

In *Hulbert v. Chicago*, 202 U. S. 275, this Court in reviewing a decision of the Illinois Supreme Court, said:

> According to the practice of the court, an error not assigned is not open to review. *Berry v. Chicago*, 192 Ill. 154, 155, 61 N.E. 498. Errors assigned, but not noticed or relied on in the brief or argument of counsel, will be regarded as waived or abandoned. *Keys v. Kimmel*, 186 Ill. 109, 114, 57 N.E. 851. And such rule of practice will be recognized by this court. *Erie R. Co. v. Purdy*, 185 U.S. 148, 153. It follows that this court has not Jurisdiction of this writ of error. [Citing cases.]

In *McGoldrick v. Compagnie General Transatlantique*, 309 U. S. 430, the Court said:

> But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, *and then only in cases coming from the Federal Courts*, that it consider questions urged by a petitioner or appellant not pressed or passed upon in the courts below. *Blair v. Oesterlein Mach. Co.*, 275 U.S. 220, 225; *Duignan v. United States*, 274 U. S. 195, 200. [Emphasis added.]

and further:

> In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented. Similarly their erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds which suitors have failed to urge

before them, or which, in the course of proceedings there, have been abandoned.

In *Edelman v. California*, 344 U. S. 357, Mr. Justice Clark, speaking for the Court, said:

> It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. *Hulbert v. Chicago*, 202 U. S. 275; *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291, 308.

Mr. Justice Stone speaking for the court in *Yakus v. United States*, 321 U. S. 414, 444, said:

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *O'Neil v. Vermont*, 144 U. S. 323, 331; *Barbour v. Georgia*, 249 U. S. 454, 460; *Whitney v. California*, 274, U.S. 357, 360, 362, 380. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. *Seaboard Air Line R. Co. v. Watson*, 287 U.S. 86. While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis, J. concurring in *Whitney v. California, supra* (274 U. S. 380, and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Compare *Woolsey v. Best*, 299 U. S. 1, 81 L. Ed. 3, 57 S. Ct. 2, with *Ex parte Siebold*, 100 U. S. 371.

See also *Musser v. Utah*, 333 U. S. 95, *Dorrance v. Pennsylvania*, 287 U. S. 660; *John v. Paullin*, 231 U. S. 583, 585, and *Central Union Tel. v. Edwardsville*, 269 U. S. 190.

The conclusion is inescapable that in these cases, here before this Court on Writ of Certiorari to the Supreme Court of South Carolina, the constitutionality of the statutes involved is not in question.

b. *Whether or not the acts of Petitioners brought them within the prohibitions of the statutes under which they were charged was not raised or briefed to the South Carolina Supreme Court and was not decided by that Court.*

The position that the Trespass and Breach of Peace Statutes are void for vagueness requires as its basis a determination that the South Carolina Supreme Court in its decisions in these cases has interpreted the statutes to apply to the acts of the Petitioners and that as so interpreted the statutes do not conform to the due process requirements of the Fourteenth Amendment.

A brief review of these records will show that this very question was deliberately abandoned by Petitioners, apparently in order to prevent a decision on this question favorable to them and to preserve the "state action" question for review by this court on facts which Petitioners considered to be outstandingly favorable to their position.

In the *Barr* case, the Petitioners were found guilty of trespass and breach of peace (Barr R. 42). In the Bouie case, the Petitioners were found guilty of trespass and Bouie himself was found guilty of resisting arrest (Bouie R. 51). The record does not contain the exceptions upon which the appeal to the Richland County Court was based and the arguments there were oral and not reported, but it is evident from the opinion of Judge Crews (Barr R. 46-51) (Bouie R. 57-62) who combined the cases and issued one opinion, that the question of whether or not the acts of the Petitioners constituted violations of the trespass statute, the breach of peace statute, and, in the case of Bouie individual-

ly, resisting arrest, were raised and argued before him and he decided adversely to the Petitioners on each count.

This question was not preserved by the very general (1 and 2) exceptions to Judge Crews' order in the Barr case, and it was abandoned entirely by Petitioners failure to argue the point in their brief and by their failure to sufficiently specify the error complained of both in their exceptions and in their statement of "Questions Involved." (Appendix 1A-13A). Upon the appeal the South Carolina Supreme Court said: (Barr R. 55-56)

> We think that Question II is based on exceptions too general to be considered. They are as follows:
>
> '1. The Court erred in refusing to hold that the City failed to prove a prima facie case.
>
> '2. The Court erred in refusing to hold that the City failed to establish the corpus delicti.'
>
> "The foregoing exceptions do not comply with rule 4, Section 6 of this Court. They do not point out in what respect the City failed to make out a prima facie case or to establish the corpus delicti. We do not know to which of the two offenses involved these exceptions are directed. We are not aided by appellants' brief. Only scant reference is there made to these two exceptions and apparently the position is taken that their determination is dependent upon the disposition of the other questions which we have held to be without merit.
>
> It has been held that an exception to the effect that the judgment is contrary to the law and the evidence is too general to be considered. *State v. Turner*, 18 S.C. 103; *State v. Cokley*, 83 S. C. 197, 65 S.E. 174; *State v. Davis*, 121 S. C. 350, 113 S.E. 491. The same conclusion has been reached with reference to an exception 'that plaintiff failed to make out a case against defendant.' *Concrete Mix, Inc. v. James*, 231 S. C. 416, 98 S.E. (2d) 841. Other pertinent cases are reviewed in *Hewitt v. Reserve Life Insurance Co.*, 235 S. C. 201, 110 S.E. (2d) 852. It was pointed out in *Brady v. Brady*, 222 S. C. 242, 72 S.E. (2d) 193, that 'every

> ground of appeal ought to be so distinctly stated that the Court may at once see the point which it is called upon to decide without having to "grope in the dark" to ascertain the precise point at issue.'

In the *Bouie* case, the same situation existed as to the trespass statute, but the Petitioner Bouie did argue the failure to prove the charge of resisting arrest and the South Carolina Supreme Court reversed the Richland County Court on that charge. The South Carolina Supreme Court, in the *Bouie* decision, did say that the Petitioners were guilty of trespass but, since that question was not before them, that statement was dictum.

It is important to the understanding of these cases to realize that the South Carolina Supreme Court, in deciding *Barr* and *Bouie*, relied heavily on its recent decision in *City of Greenville v. Peterson*. The Greenville case arose under an amendment to the trespass statute which was adopted by the South Carolina General Assembly *after* the *Barr and Bouie* convictions. This fact was not called to the attention of the South Carolina Supreme Court by the Petitioners.

Under our system of jurisprudence, state courts have the final word as to interpretation of state laws. This Court has the final word as to the conformity of state laws, as interpreted by state courts, to the United States Constitution.

This well established doctrine is stated in *Musser v. Utah*, 333 U. S. 95:

> This trial was not conducted in federal court nor for violation of federal law. It is a prosecution by the State, in its courts, to vindicate its own laws. Our sole concern with it is to see that no conviction contrary to a valid objection raised under the Fourteenth Amendment is upheld. What the statutes of a state mean, the extent to which any provision may be limited by other Acts or by other parts of the same Act, are questions on which the highest court of the State has the final

word. The right to speak this word is one which State courts should jealously maintain and which we should scrupulously observe. In order that the controversy may be restored to the control of the Supreme Court of Utah, its present judgment is vacated and the cause is remanded for proceedings not inconsistent herewith.

In the *Barr* and *Bouie* cases, the Petitioners, by raising the question of interpretation in the Richland County Court, abandoning the question before the South Carolina Supreme Court and then raising it as a constitutional question before this Court, have attempted to oust the state courts from their jurisdiction to interpret the statutes under which Barr and Bouie were convicted.

From the record, it cannot be said that the South Carolina Supreme Court has, upon proper presentation and proper briefing, held that the acts of the Petitioners are clearly within the prohibitions of the statutes involved and therefore it cannot be said that the statutes are, as interpreted by the South Carolina Supreme Court in their application to these Petitioners, void because of vagueness.

III

THE RECORDS BEFORE THE SOUTH CAROLINA SUPREME COURT SUPPORT PETITIONERS' CONVICTIONS

a. *Trespass.*

The Petitioners deliberately remained on the premises, after being told to leave, with the intent to commit an act which would lead to their arrest.

Throughout these proceedings the Petitioners have attempted to appear in two roles. In one they appear as naive college students who merely stopped in at a lunch counter in a drugstore to buy some food with no knowledge that there existed a policy or custom not to serve members of their race.[15] In this role, the request to leave and the subsequent arrest upon failure to do so came as a complete surprise. In the other role, they appear as leaders in a battle

for their alleged rights to be free from all discrimination, their presence at the lunch counters is stated as being for the purpose of asserting those rights, and they are likened to Ghandi when he marched to the sea (Pet. Br. 55).[16]

In the former role, their position as to lack of notice under the statutes that they were committing a misdemeanor would, if properly before the Court, be entitled to consideration, but in the latter role it is without merit.

The basis for the requirement of notice is that it gives the actor an opportunity to avoid doing those acts which will bring him into conflict with the terms of the statute. If Petitioners were demonstrators intent upon calling attention to the fact that the stores would not serve lunch to them, willing to risk arrest in the furtherance of their cause and, further, seeking to bring the matter into court in the belief that their cause would be vindicated, then the statement to them that they will not be served and that the proprietor wishes them to leave is adequate forewarning to them that their continued presence will subject them to arrest for trespass. At the time Petitioners were asked to leave, they were forewarned and their election was clear. Either to leave promptly or to stay and be arrested for trespass. As demonstrators, they elected to remain and be arrested. Having made this election with full intent, they cannot now complain that they had no opportunity to avoid conflict with the statutes under which they were convicted.

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[16] Testimony of Richard M. Counts (Barr R. 31)

Q. State to the Court your reason for going there?

A. Well, I invited a Fraternity Brother of mine, Charles Barr, to come and have lunch with me. . . .

A. Well as I said, when we arrived there we saw the newsmen and the policemen on the outside, so we just ignored them completely because we didn't know why they were there. . . .

[16] Testimony of Talmadge J. Neal (Bouie R. 35)

Q. As a matter of fact, wasn't it your intention when you went there, to be arrested?

A. I refuse to answer that, sir.

Q. Why? Wasn't that your intention, to be arrested?

A. I refuse to answer that.

Mr. Jenkins: If your Honor please, I suggest that the Court instruct the witness that he must answer any question put to him by the City Attorney.

The Court: That's exactly right, you will have to answer counsel's questions.

A. Yes.

b. *Breach of the Peace (Barr.)*

Under Section 15-909 of the 1952 Code of Laws of South Carolina, the South Carolina Supreme Court has defined "breach of the peace" to include:

> . . . A violation of the public order, a disturbance of public tranquility, by any act or conduct inciting to violence . . . It may consist of an act . . . likely to produce violence. It is not necessary that the peace be actually broken to lay the foundation for a prosecution for this offense. If what is done is unjustifiable and unlawful tending, with sufficient directness to break the peace, no more is required. Nor is actual personal violence an essential element in the offense. . . . *State v. Edwards*, 239 S. C. 339, 344, 123 S.E. 2d 247, 249.[17]

Beyond question, Petitioners' conduct falls within this definition.

The Petitioners had previously frequented Proprietor's store. (Barr R. 25, 34) In fact, at least one had theretofore purchased food from the lunch counter to take out. (Barr R. 34) Because of this familiarity with the store itself, Petitioners were bound to have known of its policy against serving Negroes at the counter.[18] In fact, testimony of one of the Petitioners indicates that he expected to be requested to leave. (Barr R. 28-29) They entered the store pursuant to a pre-arranged plan for the *sole* purpose of being served at the lunch counter against the known wishes of the Proprietor. (Barr R. 25, 30)

The City's testimony revealed that such a previous "demonstration" had "stopped everything" in the store. (Barr R. 24) In this instance, several lunch counter patrons jumped up and left their dinner when Petitioners were seated. (Barr R. 4, 11-12, 23-34) The entire store was

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[17] This definition of Breach of the Peace is quite similar to that propounded by this Court. *Cantwell v. Connecticut*, 310 U. S. 296, 308.

[18] Especially must Petitioners have known of this policy if in fact there was such a local "custom" as they insist. (Pet. Br. p. 25-33)

"on pins and needles . . . for fear it could possibly lead to violence." (Barr R. 23-24)

Clearly, Petitioners' insistence in remaining on the premises after ample request to leave, when they knew in advance they were not wanted and would be refused service, and when the obvious result of their refusal was to incite violence, or an act or conduct "likely to produce violence, or inciting to produce violence," and ". . . to break the peace" within the meaning of Section 15-909. Such has been the conclusion of other courts. See e.g., *Feiner v. New York*, 340 U. S. 315; *United States v. Kessler*, 213 F. 2d 53 (3rd Cir. 1952); *State v. Van Allen*, 140 Conn. 586, 102 A. 2d 526; *People v. Phillips*, 284 N. Y. 235, 30 N.E. 2d 488.

Quite a different situation existed in *Garner v. Louisiana*, *supra*, and *Thompson v. Louisville*, *supra*. In the *Garner* decision, the State Court's definition of "breach of the peace" was much narrower than that presented here. (See pages 165-169) More important, however, there was no evidence there that Petitioners had been requested to leave, that they had refused to obey any such request to leave, or that the Petitioners' conduct had disturbed other customers. Similarly, the record in the *Thompson* decision, involving a conviction for "disorderly conduct," is not comparable to that presented here. In that case, Petitioner was welcomed into the store and had been served by the Proprietor, who did not call the police. The only evidence offered by the City was Petitioner's "argumentative" conduct and attitude toward the police.

Clearly, the doctrines of these cases have no application to this record, which amply supports Petitioners' convictions for breach of the peace.

CONCLUSION

For the reasons stated the judgment of the Supreme Court of South Carolina should be affirmed or in the alternative the writ should be dismissed.

Respectfully submitted

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